Supreme Court, U.S.
FILED
NOV 12 - 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1939 and 87-2008

In The
Supreme Court of the United States
October Term, 1988

GEOFFREY W. BARNARD, AS CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,
Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. FRAZIER AND PIPER MUST NOT BE EXTENDED TO ELIMINATE CONSIDERATION OF FACTUAL SETTINGS AND LEGITIMATE LOCAL INTERESTS.

In discussing *Piper* and *Frazier* the respondents contend that the Virgin Islands Committee of Bar Examiners, the Virgin Islands Bar Association, and the Government of the Virgin Islands as *amicus curiae*, simply echo the assertions of the states of New Hampshire and Louisiana, but this overstates by far the similarity in the situation presented here and the situations at issue in the litigation involving those states.[1] It is not the contention of the Virgin Islands that non-resident lawyers are less likely to remain familiar with local rules or laws than non-residents because it is assumed in any way that the former would be less diligently devoted to their profession. It is the contention of the Virgin Islands that while lawyers in the continental United States may have ready access to the legal reference materials necessary to remain familiar

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[1]Even the early commentators, whose urging to reexamine state bar residency rules under the Privileges and Immunities Clause preceded *Piper*, acknowledged that the unique circumstances of the Virgin Islands might warrant different rules. "The validity of true continuing residency rules which are based on these policies will have to be considered on a case by case basis. The state's interest in the continuing residency of its attorneys may become substantial where, for example, the inconvenience caused by nonresident lawyers is more than de minimis or where the safeguards owed to criminal defendants are not adequately provided for by nonresident attorneys. For example, a continuing residency rule might be justifiable in the Virgin Islands since airline passenger space from the mainland is scarce and telephone service substandard." Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 Harv. L. Rev. 1461 (1979).

with local rules or laws, the same does not apply to the laws and rules of the off-shore territories whose legal reference materials are not readily available outside the jurisdiction of the distant territory. Similarly, it is not the contention of the Virgin Islands that non-resident lawyers are less likely than resident lawyers to behave ethically. It is, rather, the contention of the Virgin Islands that non-resident lawyers are less accessible than residents to a small territorial committee of volunteers of the bar association whose duty it is to supervise the ongoing ethical behavior of admitted lawyers. While it is true, as the respondents point out, that the Committee of Bar Examiners has generally followed the practice of subscribing to the service of the National Conference of Bar Examiners for purposes of conducting initial screening of applicants for admission, it is wholly impractical to suggest that the bar association, which handles all subsequent matters involving ethics and grievances, should continue to do so quarterly or annually thereafter in order to insure that lawyers, once admitted, maintain their professional standing and have not been guilty of unethical conduct elsewhere.

It is the contention of the Virgin Islands that non-resident lawyers will be less likely than resident lawyers to be available for court appearances, especially those called on short notice. If it is the contention of the respondents that this concern is not well founded, there is absolutely no adequate factual record below to sustain any such contention. Clearly those who live in the Virgin Islands, even if they occasionally take a vacation, will be substantially better able to appear for court hearings on short notice than their colleagues who reside in the continental United States. Even the latter will presumably on

occasion take a vacation and be away from their base office, but it is not that occasional absence from the office that concerns the Virgin Islands. It is the permanent absence from the territory, not for a week or two during the year, but for virtually every day during the year, rendering non-residents consistently unavailable for court appearances, especially on short notice, that makes the distinction between the two categories of practitioners reasonable and necessary.[2]

Finally, it is not the contention of the Virgin Islands that non-resident lawyers are less likely than resident lawyers to do pro bono work. Rather, the contention is that non-resident lawyers will be unable to fulfill their share of the responsibility in the Virgin Islands to represent indigent criminal defendants whose legal representa-

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[2]The Virgin Islands are not only unlike the contiguous states in the islands' great distance from the rest of the nation. It is also unlike the non-contiguous states, where distances *within* the states may approximate even the substantial distance from the nearest state where a non-resident might live. For example, difficulties in making prompt, short notice appearances in Juneau may be nearly as great for a lawyer residing in Fairbanks as for one residing in Seattle. *Noel v. Alaska Bar Assoc.*, 659 P. 2d 241 (1982). This illogic in differentiating between residents and non-residents in Alaska, however, does not apply to the Virgin Islands where all residents of the territory are within approximately 40 miles of each other and all courts. Neither do the non-contiguous states, with their larger populations and more developed economies, report particular difficulty with mail or telephone communications. *Id.* Furthermore, unlike the rule disapproved in Alaska, which allowed non-residence among active bar members after admission, the Virgin Islands rule is equally applicable before and after admission. Admitted members who move their residence to the states are redesignated inactive members, and can only practice on a *pro hac vice* admission unless they resume residence. V.I. CODE ANN. Tit. 5, App. V, Rule 51 (1982) Jt. App. 40.

tion has become the responsibility in large part of the private bar. This argument is not the argument presented by the states in *Frazier* and *Piper* which was, apparently, to the effect that non-residents might be more likely to devote their attention in *pro bono* work to their home jurisdictions rather than to their neighboring states of admission. The inclination of a non-resident lawyer to share his legal abilities with all states and all territories in which he is admitted to practice cannot conceal the fact that whenever he might contemplate performing *pro bono* services in the Virgin Islands he would have to expend substantial monies for long distance airfare, being away from his practice for not only the period of time necessary to do the legal work but the substantial period of time consumed by travel, and in general would face material obstacles to a natural inclination to share his services with the needy in the Virgin Islands.

In any event, it is a primary contention of the Virgin Islands, unlike the jurisdictions at issue in the other matters, that the long-standing responsibility of the private bar of the Virgin Islands to take a primary role in providing defense to criminal defendants who are indigent, whether or not the practitioner is commonly considered a litigator, makes the non-resident readily distinguishable from the resident lawyer, and less likely for reasons of practical inaccessibility than his resident colleague, to be in a position to fulfill this responsibility.

Petitioners do not ask the Court to assume that a non-resident—any more than a resident—would disserve his clients by failing to familiarize himself with the rules or laws in effect in the jurisdiction in question, but the facts surrounding the unique situation of the offshore ter-

ritory make it apparent that a non-resident lawyer could not do so in the Virgin Islands in any practical and reliable way. The issue is not one of comparative character or dedication, but of feasibility.

In arguing the case for admission of non-residents in *Piper*, the applicant emphasized repeatedly the significance of her proximity to the state bar of choice and the consequent irrationality of the rule as made applicable to her. Now the respondents argue, in an unwarranted effort to extend the holdings of *Piper* and *Frazier*, that even non-residents residing thousands of miles from the jurisdiction in question are entitled to outright admission to the bar and their emphasis on the proximity of the applicants in *Frazier* and *Piper* has disappeared.

While the Court in *Piper* did recognize that even non-residents living in distant places could be admitted to state bars, it observed that very different rules would obviously be permissible for such distant non-residents. The suggestion of the Court in *Piper* was that lawyers living at a "great distance" from the state of license could be required by the rules to "retain a local attorney who will be available for unscheduled meetings and hearings." This is the practical effect of the Virgin Islands rule which permits non-resident lawyers to practice *pro hac vice* provided they retain local counsel who are available for unscheduled meetings and hearings. *Id.* While *pro hac vice* admission may not be as convenient to the non-resident as full blown admission without limitations or without requirement that the non-resident have local counsel associated with him, the Court has already recognized the legitimacy of a rule imposing the latter requirement in the relatively rare case of one residing at a great distance from the proposed state of admission. In

the Virgin Islands, however, the non-resident applicant residing in a distant state will not be the rarity foreseen in *Piper*, but the rule. Thus, the rules of practice must allow the territorial court the flexibility to manage this portion of the bar efficiently, and the only practical system for such management is the well established system of *pro hac vice* admissions.

While the respondents claim that none of the states continue to impose a residence requirement, stating that Hawaii apparently amended its rules to eliminate this requirement after *Piper* was decided, and that while the rules of admission for Puerto Pico have not been officially amended, according to a telephone call to the clerk's office, that court "is admitting non-residents," we can only conclude from this description of the state of the rules on residence among the states and territories that there is a widespread belief that *Piper* and *Frazier* have eliminated any discretion in the outlying areas of the United States to consider residency in determining admission to the bar. Brief for Respondents p. 23. It is more likely that they, like the Third Circuit, have understood these two cases to create a *per se* rule of prohibition, but if the opinions in *Piper* and *Frazier* are over-inflated to extinguish all consideration of local circumstances, the entire analysis of important factual predicates in those decisions is overlooked.

Respondents also argue that the Committee has not defended Rule 56(b)(4) of Title 5, App. V of the Virgin Islands Code which provides for prior residence in the territory for a period of one year before admission. The reason this rule has not been discussed in any substantive way by the petitioners is that the applicants for admission to

the bar in this matter have always acknowledged that they have no intent to become residents of the Virgin Islands. Accordingly, if they are correct that the prospective simple residency requirement is invalid, they are obviously entitled to admission and the prior residency requirement cannot stand. However, if they are incorrect and the prospective residency requirement has been stricken by the court of appeals improperly, then they lack standing to challenge the one year prior residency rule since their acknowledgment of their lack of intention to become residents would make them ineligible for admission to the Virgin Islands Bar in any event. *Aronson v. Ambrose*, 9 V.I. 254 (D.V.I. 1972), *aff'd.* 479 F.2d 75 (3d Cir. 1973), *cert. denied*, 414 U.S. 854 (1973).

Thus, the prior residency requirement must rise or fall with the prospective simple residency requirement as to these applicants. If the prospective residency requirement is valid, any challenge to the prior residency requirement should be presented by one with standing to challenge the rule, namely, someone who does intend to become a resident of the territory but who does not meet that rule.[3]

II. THE FACTUAL DISTINCTIONS BETWEEN LEGAL PRACTICE AMONG THE STATES AND THE VIRGIN ISLANDS JUSTIFIES A RESIDENCY REQUIREMENT.

The applicants dismiss the important distinctions between the Virgin Islands and the mainland United States,

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[3]For the same reason, arguments put forth by the *amici* urging affirmance, must be limited to the standing of the actual parties to raise the issue.

but in doing so they reveal the inability of lawyers, accustomed to practice in a mainland state, to appreciate the extent to which a small American territory differs from their place of usual practice.

For example, with respect to the argument that mail service between the Virgin Islands and the mainland is "at mainland standards," the applicants exhibit their lack of familiarity with the Virgin Islands. It is not merely that mail service between the continental United States and the Virgin Islands is so inadequate that it has required congressional investigation. Neither is the fact that mail delivery *between* the islands is also objectionable a reason for failing to acknowledge the substantial differences between residents and non-residents in respect to feasible practice. In fact, in order to insure that lawyers practicing in the Virgin Islands receive orders of the court on a timely basis the District Court of the Virgin Islands and the Territorial Court of the Virgin Islands have been forced to adopt the practice of establishing physical mail boxes for each practicing lawyer in the clerks' offices into which the clerks insert all orders and notices relating to that lawyer.

The lawyers are required to check their mail boxes daily and this is normally accomplished by messenger. Obviously, this method does nothing for the non-resident who could not conceivably check his mailbox daily. Thus, the inadequacy of mail deliveries between the Virgin Islands and the United States and between the islands themselves has been the source of necessary local innovation, but to suggest that somehow the non-resident would be equally able to serve his clients, and to timely receive

notices, or that the court should be put in the position of having to anticipate the frequent lack of notice to non-resident lawyers of orders and proceedings, because of the failure of mail to reach the non-residents on a timely basis, is unworkable and an indefensible burden on the court system.

In dismissing problems of adequate legal research and ability to remain current on developments in territorial law, the respondents also note that the pocket parts for the Virgin Islands Code designated for use in 1988, arrived in the offices of counsel for the respondents in March of 1988. However, the significance of the date of receipt of a pocket part intended for this calendar year can be overlooked if one notes only the date on the front of the pocket part, which identifies the period for which it is intended for use. The pocket supplement for the calendar year 1987 "for use in 1988" includes only legislation adopted by the 1986 sessions of the Virgin Islands Legislature. (See preface to 1986 cumulative supplements Virgin Islands Code, Annotated, Equity Publishing Corporation, Oxford, New Hampshire). Thus, one who relies upon the cumulative pocket supplements to the Virgin Islands Code as a basis for legal representation of clients in the Virgin Islands would necessarily be left with the laws as they stood at the end of calendar year 1986, and would risk inadequate representation for clients as well as misleading citations to the court.

Similarly insufficient consideration is given to the legitimate problems of the territory already existing which would be a virtually insurmountable bar to effective practice for non-residents. For example, it is argued that if

the publication of court opinions or session laws is unduly delayed, the Government can simply award the contract to another publisher. This assumes, obviously without inquiry, that there are many legal publishers longing for the business of publishing this small code. Similarly, it is argued that if telephone service to the Virgin Islands is insufficient "its Public Service Commission can switch telephone carriers . . ." Brief of Respondents p. 26. This assumes that there are other telephone carriers in the territory to whom the franchise could be awarded, or that there are not existing contractual rights in favor of the local telephone company which entitle it to the exclusive right to serve the territory. Neither assumption is correct. See *Atlantic Tele-Network Co. v. Public Services Commission,* 841 F.2d 70 (3d Cir. 1988). These are the kinds of totally impractical suggestions which only someone who will not have the responsibility to make the territorial society function could make, knowing that he will not have the burden of carrying out any such suggestion as a practical matter.

Also, DeVos discounts unique cultural and linguistic aspects of Virgin Islands practice, pointing out the recent death of a respected individual thought to be the last fluent speaker of Dutch Creole in the territory. Brief of Respondents p. 37, n.12. It is understandable that persons who have not resided in the islands would fail to understand that while Dutch Creole remains an important historical influence on modern linguistics in the Virgin Islands, it is English Creole which is widely spoken today throughout the Virgin Islands and English speaking Caribbean. It is English Creole which has caused visiting

lawyers and court reporters on occasion to require translators.

The applicants then make the surprising statement that they do not doubt that some lawyers may be asked to handle three or four criminal cases a year in district court "either because they seek these assignments or because the judges trust their trial skills, but that is a matter of choice." There is absolutely no basis for this assertion in the record. In particular, there is no factual record of any lawyer ever having *asked* the District Court of the Virgin Islands for an assignment to represent an indigent, an undertaking in which the compensation to the lawyer is nominal and the time and expense involved is substantial.

The fact that the district court has consistently required that each lawyer bear his share of the responsibility for representation of the indigent, and not simply hire a mercenary substitute to handle his cases for him, is a part of the court's policy for requiring that not only the young and inexperienced lawyers but the highly successful take their share of the responsibility to assist the needy in the community. There can be no doubt that the non-resident lawyer would prefer to hire someone to stand in for him if this responsibility is not to be extinguished in his case altogether. However, there is a profound risk that if certain lawyers are not required to fulfill a responsibility to serve the needy in the same way as the majority of their counterparts, there will develop within the bar a two-class society in which the non-residents are a privileged group taking no personal responsibility for the representation of the indigent in the community.

The issue posed in respect to this rule is very direct and of importance in the Virgin Islands: May all mem-

bers of a bar, including affluent and struggling, sought-after and unknown, busy and beginners, be required to take fair and equal shares of the responsibility to represent the indigent? If this duty is and can be made an individual responsibility, then the contentions of the non-residents that they should be entitled to admission without respect to their inability to appear to represent criminal defendants upon appointment is an admission that residency is a legitimate consideration in determining admission to the bar of the territory.[4]

The applicants for admission urge that the affidavits filed by the Chairman of the Committee of Bar Examiners, who also serves as the Magistrate of the District Court, and by the President of the Bar Association, were too conclusory in nature to raise any issue of material fact when cross-motions for summary judgment were decided, citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986).

The affidavits did, in fact, address general problems of inadequate transportation, communication and accessibility. Considering his own affidavit more specific, DeVos sees the Committee and the Bar as having effectively conceded the motion, but there are problems with this analysis. First, it is not a single individual's claim to having experienced adequate flight availability and telephone connections that is at issue, but the general exper-

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[4]Now the applicants concede that the district court may require all members of the bar, resident and otherwise, to supplement the work of the Federal Public Defender in handling appointed cases. Brief of Respondents p. 26. This, however, was not the position of the applicants before the Third Circuit where they contended that the rule requiring such representation should be stricken along with the rule of residence. Pet. App. 8a n.4.

ience of an entire community which is of concern. If his experience is accurately described, it is still only one person's experience and obviously does not coincide with that of others dealing constantly with the Virgin Islands, as the other affidavits make clear. When DeVos turns in his affidavit to claims about "the best served commuter routes in this country . . . between the Virgin Islands and the airline 'hub' at . . . Puerto Rico" (Jt. App. 33) he does so without any foundation or evidentiary predicate and obviously that claim would not have constituted a matter of personal knowledge, nor did the affidavit "show affirmatively that the affiant [was] competent to testify . . ." to those matters. Fed. R. Civ. P. 56(c). Any dispute about the adequacy of the affidavits to support summary judgment should be resolved with a remand to the district court for trial on the merits.

If the factual disputes about these matters are of relevance, then it may indeed be said, as the dissent in the court of appeals suggested, that a more complete factual record is necessary and a remand for trial may be required. What cannot be fairly said is that the applicants are entitled to ask this Court to assume that the facts they contend to be true are in fact true without the need to prove them before a court at trial.

III. THE UNINCORPORATED TERRITORIES SHOULD BE ACCORDED A DEFERENTIAL STANDARD OF JUDICIAL REVIEW.

Respondents correctly point out that the Petitioners failed to note a recent decision of the Ninth Circuit reexamining its long-standing rule of deference for decisions

of the District Court of Guam. *Guam v. Yang*, 850 F.2d 587 (9th Cir. 1988).[5] However, that decision makes all the more important this Court's review of the appropriate standard for review on appeal of the decisions of the culturally diverse unincorporated territories.

In *Guam v. Yang*, the Ninth Circuit revealed its decision to renounce the deferential standard of review for the Appellate Court of Guam, and to join the Third Circuit in applying the strict *de novo* standard which the latter circuit has applied to the Virgin Islands. *Saludes v. Ramos*, 744 F.2d 992 (3d Cir. 1984). This decision leaves the First Circuit alone in following the standard of deference prescribed by this Court in *Fornaris v. Ridge Tool Co.*, 400 U.S. 39 (1970). There is good reason now to prescribe a rule of uniform and respectful deference for the decisions of the district courts of the territories in matters of interpretation of local law and in the fashioning of local rules of practice.

Guam v. Yang emphasized that the Guamanian decision on review came not from a district court judge in Guam, but from a three judge appellate division, at least two of whom by law were forbidden to be judges of a court of record of Guam. 850 F.2d at 509 n.3, (citing 48 U.S.C. § 1424-3(b)). Thus, the Court of Appeals reasoned, "there [was] simply no basis for assuming that visiting judges—even when from the nearby Northern Mariana Islands—

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[5]Like other mail, volumes of the Federal Reporter are often long delayed in their transit from the mainland to the Virgin Islands, and we regret our lack of access to this opinion when our initial brief was filed.

have any greater familiarity with local Guam law and/or customs than do the judges . . ." of the Ninth Circuit. Thus, deference to the appellate division's determination of local law was found unwarranted. 850 F.2d at 510.

Further, the Ninth Circuit gave no consideration to the opinions of this Court in *Fornaris* or *Bonet v. Texas Co.*, 308 U.S. 463 (1940), which had adopted a standard of particular deference for review of decisions of the courts of Puerto Rico. The Third Circuit in *Saludes* did recognize the existence of the line of cases including *Fornaris* and *Bonet*, and quoted from the particularly apt opinion in *DeCastro v. Board of Commissioners*, 322 U.S. 451 (1944), reviewing a decision of the Puerto Rico Supreme Court:

> A federal appellate court has ". . . the peculiarly delicate task of examining and appraising the local law in its setting, with the sympathetic disposition to safeguard in matters of local concern the adaptability of the law to local practices and needs. It is one which ordinarily cannot be performed summarily or without full argument and examination of the legal questions involved. But if in the light of such an examination it is found that the rule adopted by the local tribunal is an intelligible one, not shown to be out of harmony with local law or practice, it is not to be rejected because we think a better could have been devised or because we find it out of harmony with our own traditional system of law and statutory construction."

322 U.S. at 458-59.

The Third Circuit believed that rule had been applied only to decisions of insular courts of appeal (specifically the Hawaii or Puerto Rico Supreme Courts, coexisting with separate federal judicial systems) and implied that

the rule was inapplicable, for example, to decisions of the district court in Puerto Rico. It viewed the policy of deference as no more than a companion to the rule of deference to state supreme courts. In fact, however, the First Circuit has consistently applied the rule to decisions of all the courts of Puerto Rico, including the United States District Court. *Gual Morales v. Hernandez Vega*, 604 F.2d 730 (1st Cir. 1979). In electing to follow the Third Circuit in this divergence of views, the Ninth Circuit apparently believed the greater deference to Puerto Rican decisions arose because: (1) the district court there sits only as a true U.S. District Court and not as hybrid trial/appellate court, as the District Courts of the Virgin Islands and Guam do; and (2) the district court judges in Puerto Rico are "generally citizens of Puerto Rico" very familiar with the Spanish traditions underlying Puerto Rican law. 850 F.2d at 511, n. 7. This analysis is clearly at odds with the Third Circuit's view that the deferential standard in the Puerto Rican cases applies *only* to appellate tribunals and not to a court, like the District Court of the Virgin Islands, that frequently "serves as the trial court and interprets territorial law in the first instance." 744 F.2d at 994.

Neither the Third Circuit in *Saludes* nor the Ninth Circuit in *Guam v. Yang* give any consideration to the true policy underlying the Puerto Rican cases, as articulated in *Fornaris* and *DeCastro*. In the unincorporated territories (which Puerto Rico was in 1944 when *DeCastro* was decided) the Court had prescribed particular deference to those local courts where knowledge of local tradition, culture and practice among jurists led to "the sympathetic disposition to safeguard in matters of local concern the

adaptability of the law to local practices and needs." 322 U.S. 451, 458.[6] Failure to accord such deference to those courts had previously led the Court to recognize the "delicate problems" inherent in permitting construction of laws "impregnated with the Spanish tradition" by higher courts applying "Anglo-Saxon traditions," leaving "little room for the overtones of Spanish culture." *Fornaris v. Ridge Tool Co.*, 400 U.S. at 42-43.

That policy suggests the need to adopt a uniform deferential standard of review for all unincorporated territorial court decisions on matters of local law and practice. Such a standard, if applied here, would clearly warrant sustaining the local rule at issue. This is true not because the territories can interpret the Constitution in a manner inconsistent with this Court's opinions, but because in the application of the Privileges and Immunities Clause this Court has recognized the importance of allowing local jurisdictions "considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). In that role, the Virgin Islands and all unincorporated territories should be accorded the deference promised in *Fornaris*.

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[6]The District Court of the Virgin Islands is, of course, a part of the judicial branch of the Virgin Islands, rather than the United States. 48 U.S.C. § 1611(a). See also, *Territorial Court of the Virgin Islands v. Richards*, 847 F.2d 108 (3d Cir. 1988), *Petition for Cert.* filed (No. 88-328).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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